



Legal Issues and Questions in Enforcement

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Consent Orders and Settlement Agreements



Question:

May a Consent Order or Settlement Agreement provide that a contractor pay the monetary remedy to a recipient other than the U.S. Treasury (e.g., research, charitable, or educational organizations) ?

Answer: No



Consent Orders and Settlement Agreements (cont'd)



- Payment to a recipient other than the U.S. Treasury violates Miscellaneous Receipts Act (MRA) (31 U.S.C. §§ 3302(a) and (b))
- Congressionally authorized appropriations for DOE programs may not be supplemented by acceptance of additional monies
- No statutory exception to MRA under Atomic Energy Act (42 U.S.C. §§ 2282a, 2282b, and 2282c)



Consent Orders and Settlement Agreements (cont'd)



Question:

May a Consent Order or Settlement Agreement provide that a contractor pay for and perform a service that benefits DOE/NNSA in lieu of a monetary remedy?

Answer: No



Consent Orders and Settlement Agreements (cont'd)



- **Examples of services:** Provide safety training to contractors throughout DOE complex; Purchase fire trucks for use by the local fire department
- Performing such actions in lieu of paying a settlement sum is prohibited:
 - “Remedy” must have legally sufficient nexus to the underlying deficiencies
 - Circumvents Miscellaneous Receipts Act



Allowability of Costs - Corrective Actions



Question:

May a contractor recover corrective action costs associated with an enforcement proceeding?

Answer: Yes



Allowability of Costs - Corrective Actions



- Fully allowable under Major Fraud Act (MFA) (41 U.S.C. § 256(k))
- Not considered a “proceeding” cost subject to MFA reimbursement restrictions
- “Proceeding” includes an investigation
- Corrective action costs incurred regardless of whether DOE investigates underlying noncompliances



Allowability of Costs - Investigations



Question:

May a contractor recover costs associated with an enforcement investigation?

Answer: In some cases, but typically no



Allowability of Costs - Investigations (cont'd)



- Should be segregated from potentially allowable costs following receipt of a Notice of Intent to Investigate (NOI). NOI commences a “proceeding”
- Segregate costs incurred before or after receipt of NOI
- Unallowable under MFA if investigation results in Notice of Violation and civil penalty imposition
- May be allowable under MFA if investigation results in Consent Order/Settlement Agreement



Allowability of Costs - Investigations (cont'd)



- Up to 80% of investigation related costs allowable under MFA if result is settlement
- Percentage of allowability, if any, referenced in settlement instrument
- Contracting Officer, Site and Program Office, and Office of Enforcement involved in allowability determination
- 80% ceiling also applies if investigation results in Enforcement Letter or no enforcement activity



Notices of Violation - Prescribing Corrective Actions



- May prescribe corrective actions in addition to payment of civil penalty
- Similar to current practice for Consent Orders/Settlement Agreements
- Legally sufficient nexus to underlying violations to constitute a “remedy”



Due Process Considerations



- Following investigation, DOE may directly proceed to PNOV issuance.
- *Nuclear Safety/Worker Safety and Health* – Reply must be filed.
- *Classified Information Security* – Reply may be filed
- May contest facts and alleged violations including associated severity level and proposed civil penalty



Investigation Report Markings



- All Investigation Reports now marked **“Official Use Only (OUO)”**
- Pre-decisional in nature
- Contractor may contest facts and provide additional mitigating factors at enforcement conference or through correspondence with DOE



Investigation Report Markings (cont'd)



Question:

Is an Investigation Report considered pre-decisional even after DOE makes a final decision on the appropriate enforcement outcome?

Answer: Yes



Investigation Report Markings (cont'd)



- OUO marking references any applicable Freedom of Information Act exemption (5 U.S.C. §§ 552(b)(1) through (b)(9))

OFFICIAL USE ONLY

May be exempt from public release under the
Freedom of
Information Act

(5 U.S.C. 552), exemption number and
category: Exemption 5-
Privileged Information.

Department of Energy approval required before
public release.

Name/Organization: XXXXXX, HS-XX Date:
XXXXXX

Guidance (if applicable): XXXX



Investigation Report Markings (cont'd)



- DOE typically invokes exemption (b)(5) – the deliberative process privilege
- Exemption 5 applies to Investigation Report even after DOE makes final decision